

ST 07-19

Tax Type: Sales Tax
Issue: Sales v. Resale Issues

**STATE OF ILLINOIS
DEPARTMENT OF REVENUE
OFFICE OF ADMINISTRATIVE HEARINGS
CHICAGO, ILLINOIS**

**THE DEPARTMENT OF REVENUE
OF THE STATE OF ILLINOIS**

v.

ABC, INC.,

Taxpayer

No. 00-ST-0000

IBT 0000-0000

NTL Nos. 00 00000000000000, 000, 000

**Kenneth J. Galvin,
Administrative Law Judge**

RECOMMENDATION FOR DISPOSITION

Appearances: Mr. Alan F. Segal, on behalf of ABC, Inc., Mr. John Alshuler, Special Assistant Attorney General, on behalf of the Department of Revenue of the State of Illinois.

Synopsis:

This matter comes on for hearing pursuant to a protest filed by ABC, Inc., (hereinafter "ABC") of Notices of Tax Liability Nos. 00 000000000000000000 and 000 issued May 31, 2006 covering the audit period January, 2002, through September, 2004, which assessed retailers' occupation tax due for unreported sales.

An evidentiary hearing was held in this matter on July 9, 2007 with Mr. John Doe, President of ABC, testifying. Following a review of the testimony and the evidence, it is recommended that the Notices of Tax Liability be finalized as issued. In support thereof, the following "Findings of Fact" and "Conclusions of Law" are made.

Findings of Fact:

1. The Department's *prima facie* case, inclusive of all jurisdictional elements, is established by the admission into evidence of Notices of Tax Liability Nos. 00 00000000000000, 000 and 000, issued May 31, 2006 showing unpaid retailers' occupation tax, penalties and interest, covering the audit period January, 2002, through September, 2004. Tr. pp. 10-11; Dept. Ex. No. 1.

Conclusions of Law:

The Department of Revenue issued Notices of Tax Liability ("NTL") Nos. 00 00000000000000 through 000 to ABC covering the audit period January, 2002, through September, 2004, assessing unpaid retailers' occupation tax. Dept. Ex. No. 1. Section 4 of the Retailers' Occupation Tax Act, (35 ILCS 120/1 *et seq.*), provides that the NTL's issued by the Department are *prima facie* correct and are *prima facie* evidence of the correctness of the amount of tax due. *Id.* at 120/4. Once the Department has established its *prima facie* case by submitting the NTL's into evidence, the burden shifts to the taxpayer to overcome the presumption of validity. Clark Oil & Refining v. Johnson, 154 Ill. App. 3d 773 (1st Dist. 1987).

In order to overcome the presumption of validity attached to the NTL's, the taxpayer must produce competent evidence, identified with its book and records showing that the NTL's are incorrect. Copilevitz v. Department of Revenue, 41 Ill. 2d 154 (1968). Testimony alone is not enough. Mel-Park Drugs, Inc. v. Department of Revenue, 218 Ill. App. 3d 203 (1st Dist. 1991). Documentary proof is required to prevail against an assessment of tax by the Department. Sprague v. Johnson, 195 Ill. App. 3d 798 (4th Dist. 1990). On examination of the record in this case, I find

that ABC has failed to demonstrate by testimony, through exhibits or through argument, evidence sufficient to overcome the Department's determination that retailers' occupation tax is due.

At the evidentiary hearing in the instant case, ABC did not produce any documents, identified with its books and records, showing that the NTL's are incorrect. Mr. Doe, President of ABC, testified that the Department's auditor disallowed some of ABC's resale sales because ABC did not retain resale certificates. Mr. Doe caused to have admitted Taxpayer's Ex. Nos. 1 and 2, which are the Department auditor's "Schedule of Resale Sales" for 2002 and 2003, respectively, showing sales that were "disallowed-no resale certificate." Mr. Doe testified that he can't find the resale certificates: "You know, they were valid legitimate businesses, they just aren't in business anymore. I have tried to track down a couple of the people. You know, I just can't find them, you know." Tr. pp. 31-32.

Section 1 of the Retailers' Occupation Tax Act (hereinafter "ROTA") defines "sale at retail" as including "any transfer, made for or without a valuable consideration, for resale in any form as tangible personal property unless made in compliance with Section 2c of this Act." Section 2c requires that a purchaser who claims to be a reseller must apply for a resale number which will be issued by the Department after it receives sufficient information from the purchaser about its resale operations. Section 2c also states that no sale shall be made tax-free on the ground of being a sale for resale unless the purchaser has an active registration number or resale number from the Department and furnishes that number to the seller in connection with certifying to the seller that any sale to such purchaser is nontaxable because of being a sale for resale. 35 ILCS 120/2c.

The language of the statute is clear. The ROTA considers any transfer of personal property for resale to be a "sale at retail" unless that sale is made in compliance with Section 2c. Compliance with Section 2c requires that the purchaser have a registration number or resale number. At no time

in the proceedings did ABC produce, or claim to have, the statutorily required evidence of the disallowed purchasers' approved resale status. Section 2c creates an exemption to the ROTA's broad construction of "sale at retail" and such exemptions are to be strictly construed in favor of taxation. People ex rel. County Collector v. Hopedale Medical Foundation, 46 Ill. 2d 450 (1970). Once the Department established its *prima facie* case, the burden shifted to ABC to show that the disallowed sales for resale were exempt. ABC could only meet this burden by showing compliance with Section 2c and producing evidence of the registration or resale numbers. Dearborn Wholesale Grocers v. Whittler, 74 Ill. App. 3d 813 (1st Dist. 1979). There having been no compliance with this statutory requirement, ABC cannot now benefit from the exemption.

Mr. Doe also testified that the Department's auditor incorrectly included equipment rebates and commissions paid to ABC's dealers in unreported taxable receipts. Mr. Doe caused to have admitted the Department auditor's "Schedule of Unreported Taxable Receipts," showing an adjustment for "Equipment Rebates included in Commissions-based on best available info-10/2003 through 9/2004." Taxpayer's Ex. No. 3. Mr. Doe testified that a portion of these commissions were paid to his dealers and the commissions should not have been included in his taxable receipts. When asked if he had any idea of an approximate percentage, he responded, "[A]t least 50 to 60 percent, I'm guessing." Tr. p. 34. Mr. Doe also did not believe that "those figures" should have been included in his taxable receipts because the phones were not sold for "those amounts." Tr. pp. 34-35. No documentary evidence was admitted to show what "those amounts" were. The "source" for the "equipment rebates included in commissions" was the auditor's Schedule E, which was not admitted into evidence. The auditor was not called to testify at the evidentiary hearing.

Once the Department established its *prima facie* case by submitting the NTL's into evidence, the burden shifted to ABC to overcome the presumption of validity. Clark Oil &

Refining v. Johnson, 154 Ill. App. 3d 773 (1st Dist. 1987). In order to overcome the presumption of validity attached to the NTL's, the taxpayer must produce competent evidence, identified with its book and records showing that the NTL's are incorrect. Copilevitz v. Department of Revenue, 41 Ill. 2d 154 (1968). ABC cannot overcome the Department's *prima facie* case by submitting selected portions of the auditor's report into evidence and explaining what it believes the errors are. It is unclear from the record what ABC's arguments are concerning the commissions paid to dealers and the rebates included in commissions. If the record were clear about these arguments, the record affords me no basis to make an adjustment to the amounts because ABC's own competent books and records were not admitted into evidence. "Guessing" that at least 50% to 60% of the commissions were paid to ABC's dealers, and arguing that phones were not sold for "those amounts," without more, does not afford a basis to conclude that the NTL's are incorrect. The testimony of Mr. Doe failed to rebut the *prima facie* case of the Department.

WHEREFORE, for the reasons stated above, it is my recommendation that NTL Nos. 00 0000000000000, 000, 000 should be finalized as issued.

August 27, 2007

Kenneth J. Galvin
Administrative Law Judge